

1 J. SCOTT RUSSO (CA STATE BAR No. 155631)  
2 RUSSO & DUCKWORTH, LLP  
3 9090 Irvine Center Drive, Second Floor  
4 Irvine, California 92618  
5 Telephone No. (949) 752-7106  
6 Facsimile No. (949)752-0629

7 Attorneys for Plaintiff  
8 American Cab, LLC  
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10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

12 AMERICAN CAB, LLC, a California  
13 limited liability company,,  
14 Plaintiff,

15 v.

16 SUNLINE SERVICES GROUP;  
17 SUNLINE TRANSIT AGENCY, and  
18 DOES 1-100, inclusive,

19 Defendants.  
20

Case No. CV 12-05552 GW (OPx)  
Assigned to Honorable George H.  
Wu

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT, OR IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION OF ISSUES;  
DECLARATION OF J. SCOTT  
RUSSO  
IN SUPPORT THEREOF**

Hearing on Motion:  
Date: April 1, 2013  
Time: 8:30 a.m.  
Courtroom: 10

Date Action Filed: June 26, 2012  
Trial Date: May 14, 2013

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22  
23 Plaintiff American Cab, LLC ("Plaintiff" or "American Cab")  
24 respectfully submits the following Memorandum of Points and Authorities  
25 In Opposition to Defendants SunLine Services Group ("SSG") and  
26 SunLine Transit Agency's ("STA") Motion for Summary Judgment or In the  
27 Alternative, Summary Adjudication of Issues.  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

“[O]ne person may not be intrusted in the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.” *Carter v. Clark* (1936) 298 U.S. 238, 311, 56 S.Ct. 855.

In this case, the cities and county in the Coachella Valley formed a joint powers authority for a transit agency (STA) whose sole purpose is providing public transportation in the form of busses and ADA transportation, Dial-A-Ride. The same cities and county later formed a second joint powers authority (SSG) to operate a compressed natural gas (CNG) fueling station to be located at STA. The agreement for SSG expressly states that SSG cannot be involved in activities that are “transit related”<sup>1</sup> and the board members and general manager will be the same as STA.

Later the cities and county gave SSG authority over all taxi regulation for the Coachella Valley, but they neglected to change the requirement that the boards and general manager for STA and SSG would be the same people. The taxi companies are in competition with STA so STA, through SSG, is regulating its competition. The STA/SSG board has created rules and enacted an ordinance which prevents the taxi franchises from growing, being profitable and competing with STA. The Chairman of the Boards of STA and SSG has publically admitted over and over that the

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<sup>1</sup> “Transit is defined as “the conveyance of persons or things from one place to another.” Merriam Webster Dictionary.

1 taxi companies are in competition with STA and there is a clear conflict of  
2 interest in the "two hats" the board members wear.

3 By this lawsuit, American Cab is seeking an order for either (1) that  
4 taxi regulation be moved to a different agency whose board members and  
5 management are not conflicted, or (2) that SSG delegate taxi regulation to  
6 an advisory board and different management as is specially allowed under  
7 the California's joint powers authority law.<sup>2</sup> At a minimum, American Cab is  
8 requesting an order striking the rules enacted by SSG which restrain free  
9 trade.

10 In this Motion, Defendants don't seem to dispute that the have  
11 engaged in a combination or conspiracy in restraint of free trade, but  
12 rather they seek summary judgment based on their defenses of "no  
13 concerted action" and State Action Immunity. Defendants rely 100% on  
14 the joint powers authority agreements and do not make any attempt to  
15 consider the facts and implications. When the actual facts are considered,  
16 it is clear that Defendants' have not carried their burden for summary  
17 judgment or adjudication.

## 18 **II. STATEMENT OF FACTS**

19 In 1977, the nine Coachella Valley cities and the County Riverside  
20 formed STA pursuant to a joint powers agreement. STA's sole purpose is  
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22 <sup>2</sup> Government Code Section 6508, which is in the heart of the joint powers agency  
23 statutes, states, in pertinent part, "The governing body so created shall be empowered  
24 to delegate its functions to an advisory body or administrative entity for the purposes of  
25 program development, policy formulation, or program implementation, provided,  
26 however, that any annual budget of the agency to which the delegation is made must be  
27 approved by the governing body of the Joint Powers Agency.  
28

1 to provide public transportation, specifically fixed route busses and curbside  
2 curbside ADA Dial-A Ride transportation. STA's Dial-A-Ride is called "Sundial".  
3 [Uncontroverted Fact ("U.F." Nos. 1 and 12)].

4 In 1993, the same nine Coachella Valley cities and the County of  
5 Riverside formed another joint powers agency, SSG. SSG's sole purpose  
6 was to provide a CNG filling station. The joint powers agreement for SSG  
7 expressly states that SSG cannot be involved in activities that are "transit  
8 related" and the board members and General Manager will be the same as  
9 STA. [U.F. Nos. 2-5; SSG SSG Joint Powers Agreement (Defendants' Ex.  
10 B)].

11 Although Defendants have not produced an enabling document,  
12 sometime after 1993 the nine cities and County executed an agreement  
13 implementing the additional grant of power to SSG, taxi regulation. [SSG  
14 Ordinance No. 2012-01 (Plaintiff's Ex. 6). The requirement that the STA  
15 and SSG boards and general manager be the same was not changed.  
16 [U.F. Nos. 4-5, 8-9]. Apparently, the CNG filling station became part of  
17 STA. SSG's sole business is taxi regulation. [U.F. No. 13].

18 STA and SSG are different entities with different purposes.[U.F. No.  
19 11].

20 American Cab is a taxi company located in Thousand Palms,  
21 California. American Cab is one of only three authorized taxi franchises in  
22 the Coachella Valley. The other two franchises are Yellow Cab of the  
23 Desert ("Yellow Cab") and Desert City Cab ("City Cab"). SSG has issued  
24 180 total taxi permits, and American Cab has received 45 permanent  
25 permits and 25 temporary permits. [Declaration of Harry Incs ("Incs Decl.")  
26 ¶1-2].

27 American Cab's business model is different from Yellow Cab and  
28 City Cab. American Cab has reinvested all profit back into the business so

1 that it is capitalized to invest and expand. None of the managers of  
2 American Cab are taxi drivers. American Cab advertises heavily while  
3 Yellow Cab and City Cab do not. American Cab has purchased the best  
4 available reservation, dispatch, GPS and communications hardware and  
5 software, and has paid much more for its fleet to include hybrid cars.  
6 American Cab also invested in the purchase of ADA compliant vans to  
7 serve disabled customers. American Cab has built a state of the art  
8 headquarters and auto maintenance facility. As a result of its superior  
9 investment and effort, American Cab accounts for about 45% of all the taxi  
10 rides in the Coachella Valley. On average, the American Cab cars provide  
11 about 50% more rides each day per car than either Yellow Cab or City  
12 Cab, with most of the rides being dispatched. [Incs Decl. ¶[3]

13 American Cab follows the business model of most California taxi  
14 companies. The SSG permitted cars are leased to the drivers on a weekly  
15 basis to drivers who are independent contractors. The cars are fully loaded  
16 with computers, credit card machines and communications hardware.  
17 American Cab does not receive any income from the customers, nor do  
18 the drivers account to American Cab for their fare income or tips. In  
19 addition to the loaded vehicles, what American Cab provides is the  
20 dispatching of customer calls for rides. The rates that American Cab can  
21 charge for a car lease is a direct function of the number rides that  
22 American Cab is dispatching to the drivers. The more calls that can be  
23 reasonably assured to the drivers causes the lease rates to increase, and  
24 when the number of calls increases past the point that the drivers cannot  
25 timely respond more cars and drivers should be added. When the number  
26 of calls slow down, lease rates decrease. All of American Cab's marketing  
27 and advertising efforts are to keep the call volume up all year. American  
28



1 Cab's only income is from the car leases and from third party advertising  
2 on the cars. [Incs Decl. ¶4].

3 American Cab has never needed to reduce the number of cars due  
4 to a lack of sufficient business to maintain a minimum number of calls for  
5 each driver. However, the number of calls is less during the June-October  
6 period, when there is less tourism in the Coachella Valley, so it is hard for  
7 the drivers to make a reasonable income. [Incs Decl. ¶5].

8 There is a minimum number of cars that any properly run taxi  
9 company needs to prosper due to the large capital investment and  
10 operating costs. 100 cars is the accepted number in the industry to make  
11 the expected return to justify the investment required for a modern taxi  
12 company. [U.F. No. 21].

13 American Cab has applied for additional taxi permits many times,  
14 justifying its request with SSG's reports on the ridership for the three  
15 franchises. American Cab has the call volume and ridership to justify  
16 having 100 cars on the road from November-May. The only concession  
17 granted by SSG has been the 25 temporary permits. SSG's explanation  
18 for not granting American Cab more taxi permits is so that American Cab  
19 does not become a "de facto monopoly". [Incs Decl. ¶7.].

20 American Cab participates in the federally funded Taxi Voucher  
21 program which STA administers. Customers apply to STA for taxi  
22 vouchers whereby the customer pays 50% of the regular fare and the  
23 remainder is paid to taxi company from federal funds. Customers qualify if  
24 they are disabled or over 60 years old. [Incs Decl. ¶8-9].

25 STA provides the public bus service and a curb to curb on demand  
26 paratransit service for persons qualified under ADA, a program STA  
27 named "SunDial". [Incs Decl. ¶10].

28

1 To the extent permitted by SSG, American Cab competes directly  
2 with STA for customers, particularly for disabled customers. Using their  
3 ADA vans, the taxi companies can transport disabled customers more  
4 efficiently and more cost effectively than STA. For SunDial, STA uses  
5 salaried drivers who drive 20+ passenger shuttle busses to transport what  
6 is generally one or two customers at a time. STA has already  
7 acknowledged that the taxi companies should be competing to provide  
8 Dial-A-Ride. If the taxi franchises were permitted to fairly compete for ADA  
9 transportation, it would permit them to remain busy consistently and not  
10 just during the tourist season. [U.F. Nos 14 & 23; Incs Decl. ¶11].

11 The SSG board has enacted SSG Ordinance No. 2012-01 (the  
12 "Ordinance"), which is the taxi ordinance establishing the rules that the taxi  
13 franchises must abide by [Plaintiffs Ex. 6]. The SSG board also enacted  
14 Taxicab Regulations to supplement the Ordinance [Plaintiff's Ex. 7].

15 The STA board members, when they puts on their SSG hats,  
16 establish the rates the taxi drivers can charge customers, the rider  
17 surcharges and the fees charged to the franchises. On a per taxi basis the  
18 cost of regulation by SSG is the highest in California, and 2-3 times as  
19 much as the next highest taxi regulatory agency. SSG sets the rider  
20 surcharges and fees charged to the drivers and franchises based on its  
21 budget. The high regulatory fees and surcharges causes high taxi fare  
22 rates which drives customers to STA as a less expensive alternative. [U.F.  
23 No. 22 & 35].

24 The STA board has a conflict of interest when it also acts as the  
25 SSG board, a fact repeatedly admitted by the Chairman of the Board of  
26 STA and SSG. [U.F. No. 15]. In fact the Chairman of the Board(s) admits  
27 that the STA board is obligated to expand the business of STA and  
28 maximize its farebox revenue but feels no duty to assist the growth of the

1 taxi franchises. [U.F. Nos. 16 & 18]. The General Manager(s) admits that it  
2 is his job to expand the ridership for STA's busses and ADA transportation  
3 and grow its farebox revenue, but he feels no duty to help the taxi  
4 franchises grow. [U.F. No. 17 & 19].

5 While the conflict of interest in the "two hats" worn is admitted,  
6 neither the Chairman of the Board(s) or the General Manager(s) can  
7 articulate any reason or logic for why the STA and SSG boards are the  
8 same. [U.F. No. 20].

9 An example of the SSG board restricting the taxi franchises to  
10 benefit STA is its enactment of Ordinance Section 1.225, which states:

11 "No Franchisee nor representative of a Franchisee, including any  
12 Driver or agent acting on behalf of a Franchisee, shall make  
13 arrangements in exchange for compensation for exclusive or  
14 preferential service rights with any venue, business establishment or  
15 public transportation facility within the jurisdiction of SSG which  
16 generates Taxicab transportation service trips." [Plaintiff's Ex. 6, p.  
17 33]

18 Section 1.225 effectively prevents the taxi franchises from doing  
19 anything to increase their business other than perhaps advertising. No taxi  
20 franchise can be rewarded for superior service. If a hotel, hospital, dialysis  
21 center or convention organizer wants to make American Cab its preferred  
22 provider, if American Cab agrees it is in violation of the Ordinance and its  
23 franchise can be terminated. [U.F. No. 26]. The General Manager cannot  
24 articulate any way for the taxi franchisees to expand their business when  
25 faced with Section 1.225 [U.F. No. 28]. The Chairman of the Board(s)  
26 cannot cite any logical reason for the prohibition of Section 1.225. [U.F.  
27 No. 27].  
28

1 But for Section 1.225, American Cab would be able to establish  
 2 preferred or exclusive service agreements with hotels, hospitals and  
 3 medical providers, venues and businesses which would enable American  
 4 Cab's drivers to remain busy all year. Because the taxi franchises are  
 5 prohibited from having any relationships to increase the number of rides,  
 6 enable a reduction of rates, keep the drivers busy all year and cause a  
 7 demand for more taxis, the customers do not use taxis and are driven to  
 8 the transportation provided by STA. [Incs Decl. ¶¶17-19].

9 Other than lease revenue, the only other source of income for  
 10 American Cab is third party advertising on the vehicles. Neither the  
 11 Ordinance or Taxi Regulations provide any express rules regarding third  
 12 party advertising. However, the rule is that the STA Chief of Staff who is  
 13 also the SST Taxi Administrator, Ms. Nightingale [U.F. No. 24], must give  
 14 prior approval of the content and placement of any advertisement. Ms.  
 15 Nightingale is also the person who approves that third party advertising on  
 16 STA's busses. [U.F. No. 29].

17 American Cab objects to being regulated by SSG because its  
 18 controlled by its American Cab's biggest competitor, STA. Through the  
 19 Ordinance and decisions by STA/SSG boards and staff, American Cab is  
 20 held down, cannot fairly compete and is prevented from growing and  
 21 profiting from its investment.

### 22 **III. LEGAL ARGUMENT**

#### 23 **A. Defendants' Have Failed To Meet Their Burden Of Proof.**

24 Because summary judgment is a drastic device, cutting off a party's  
 25 right to present its case to a jury, the moving party bears a "heavy burden"  
 26 of demonstrating the absence of any triable issue of material fact.

27 *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc.* (2<sup>nd</sup> Cir. 1999) 182  
 28 F.3d 157, 160. A party "must establish beyond peradventure *all* of the

1 essential elements of the claim or defense to warrant judgment in his  
2 favor.” *Fontenot v. Upjohn Co.* (5<sup>th</sup> Cir 1986) 780 F.2d 1190, 1194. “A  
3 moving party without the ultimate burden of persuasion at trial – usually  
4 but not always the defendants – has both the initial burden of production  
5 and the ultimate burden of persuasion on a motion for summary  
6 judgment.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.* (9<sup>th</sup> Cir.  
7 2000) 210 F.3d 1099, 1102. If the moving party fails to carry its initial  
8 burden of production, the opposing party has no obligation to produce  
9 anything. *Id.*, at 1102-1103.

10 Defendants have produce very little if any evidence that supports  
11 their claim that they are entitled to summary judgment in the instant  
12 matter. For the most part, their Motion is supported by conclusory  
13 allegations based solely on the existence of the STA and SSG joint  
14 powers agreements. This does not meet their heavy burden.

15 B. SSG And STA Are Factually And Legally Distinct, Separate  
16 Entities And Capable Of Concerted Action.

17 In their Motion, Defendants state that because the Boards and  
18 General Managers of SSG and STA are identical, they are therefore one  
19 entity and incapable of conspiring with one another and, therefore, are not  
20 subject to the Sherman Act. (Motion, pp. 5-7, 12-13.) Defendants  
21 selectively cite to *American Needle, Inc. v. National Football League*  
22 (2010) 130 S.Ct. 2201 (“*Am. Needle*”) contending that because SSG and  
23 STA have identical centers of decision making, they are in fact one entity.  
24 This argument is a red herring. In reality, the Court in *Am. Needle*,  
25 actually found that while separate entities may be comprised of identical  
26 members, they have separate and distinct economic interests and  
27 therefore are capable of concerted action in violation of the Sherman Act.

1 The Court in *Am. Needle* cited extensively to the holdings in  
 2 *Copperweld Corporation v. Independence Tube Corporation* (1984) 467  
 3 U.S. 752, 104 S.Ct. 2731 (“*Copperweld*”) for the proper analysis in  
 4 determining whether or not parties are subject to liability under the  
 5 Sherman Act.

6 “As *Copperweld* exemplifies, ‘substance not form, should determine  
 7 whether a[n] ... entity is capable of conspiring under § 1.’” *Am. Needle*, at  
 8 2211 (citing *Copperweld*, at 773, n. 21, 104 S.Ct. 2731).

9 As the *Am. Needle* Court concluded “[T]heir general corporate  
 10 actions are guided or determined’ by ‘separate corporate  
 11 consciousnesses,’ and ‘[t]heir objects are’ not ‘common.’” *Am. Needle*, at  
 12 2212 (citing *Copperweld*, at 771, 104 S. Ct. 2731).

13 When entities are acting as “‘separate economic actors pursuing  
 14 separate economic interests,’” there is a potential of “‘independent  
 15 center[r] of decisionmaking’.” *Am. Needle*, at 2213 (citing *Copperweld*, at  
 16 769, 104 S.Ct. 2731.).

17 “Concerted activity inherently is fraught with anticompetitive risk. It  
 18 deprives the marketplace of the independent centers of  
 19 decisionmaking that competition assumes and demands. In any  
 20 conspiracy, two or more entities that previously pursued their own  
 21 interests separately are combining to act as one for their common  
 22 benefit. This not only reduces the diverse directions in which  
 23 economic power is aimed but suddenly increases the economic  
 24 power moving in one particular direction. Of course, such mergings  
 25 of resources may well lead to efficiencies that benefit consumers, but  
 26 their anticompetitive potential is sufficient to warrant scrutiny even in  
 27 the absence of incipient monopoly.” *Copperweld*, at 768-769, 104  
 28 S.Ct. 2731.



1 When determining the capability of concerted activity between  
2 corporations, the Court in *Freeman v. San Diego Association of Realtors*  
3 (9<sup>th</sup> Cir. 2003) 322 F.3d 1133 undertook the following analysis:

4 The theme in these cases is economic unity. Where there is  
5 substantial common ownership, a fiduciary obligation to act for  
6 another entity's economic benefit or an agreement to divide profits  
7 and losses, individual firms function as an economic unit and are  
generally treated as a single entity. *Id.*, at 1148.

8 Although the single-entity inquiry is fact-specific, a few general  
9 guidelines emerge. First, in the absence of economic unity, the  
10 fact that joint venturers pursue the common interests of the whole  
11 is generally not enough, by itself, to render them a single entity.  
"[A] commonality of interest exists in every cartel." [Citations  
omitted.] *Id.*

12  
13 Second, in the absence of economic unity, the fact that firms are  
14 not actual competitors is also usually not enough, by itself, to  
render them a single entity. *Id.*, at 1148-1149.

15 In determining whether or not two separate entities exist capable of  
16 concerted activity, various issues are key to the analysis: (1) what is the  
17 functional difference in the conduct of which the entities actually operate  
18 (*Am. Needle*, at 2209); (2) are the entities comprised of separate  
19 economic actors pursuing separate economic interests (*Copperweld*, at  
20 769, 104 S.Ct. 2731); and (3) is there a unity of purpose or common  
21 design (*Id.*).

22 Defendants' own admissions belie the contention that they are one  
23 entity incapable of concerted action. The Joint Rule 26(F) Report states  
24 as follows:

25 Sunline Services Group is a public agency and a joint  
26 powers authority created in 1993. by the nine Coachella  
27 Valley cities to procure and dispense compressed natural  
28 gas fuel to the fleet of busses owned and operated by  
Sunline Transit Agency. In 1996, the nine Coachella Cities

1 amended the **Sunline Services Group JPA to authorize it**  
 2 **to regulate taxicabs in the Coachella Valley in 1996.**  
 3 **Sunline Transit Agency, a separate governmental**  
 4 **agency and joint powers authority, was created in 1977**  
 5 **to provide and operate a public transportation system in**  
 6 **the Coachella Valley through the operation of a bus**  
 7 **system.** As required by state and Federal law, Sunline  
 8 Transit Agency also provides ADA required parallel service  
 9 in the form of a Dial-A-Ride program.

10 Sunline Services Group has established Sunline Regulatory  
 11 Agency to perform the taxi regulatory function. The two  
 12 governmental entities, Sunline Transit Agency and Sunline  
 13 Services Group have certain employees, facilities and  
 14 resources in common, **but each governmental entity is**  
 15 **independently responsible for its proportionate share of**  
 16 **any such employees, facilities and resources.**  
 17 (Emphasis added.) (Register of Actions No. 16, p. 2, Ins. 4-  
 18 18.)

19 Further, The Joint Power Agreements of each of these entities  
 20 confirm that SSG and STA have separate economic interests. The  
 21 economic interest of STA is to provide a public transit system in the  
 22 Coachella Valley, specifically busses and vehicles for the disabled. The  
 23 economic interest of SSG is the regulation of the taxi industry.

24 In the instant matter, SSG and STA do not function as an economic  
 25 unit in operation or provision of services to the public. They do not share  
 26 profits or losses. The fact that they are not competitors is irrelevant.

27 Defendants' argument that because the Boards of SSG and STA are  
 28 identical and therefore have the same centers of decisionmaking, is form  
 over substance. The fact that the Board of SSG is the same as the Board  
 of STA does not shield them from the fact of their "concerted action". STA  
 and SSG hold monthly Board meetings. The STA meeting and the SSG  
 meeting are held in the same location, but are held at different times, with  
 completely different agendas and discussion topics. The STA meeting



1 addresses issues relating to public transportation vis-à-vis bus  
 2 transportation and Dial-A-Ride. The SSG meeting addresses issues  
 3 relating to the taxi industry. In essence, what occurs is that the Board  
 4 members must transition from their “STA hat” to their “SSG hat”.

5 As set forth above, when looking to substance over form, STA and  
 6 SSG are factually and legally distinct entities each pursuing their own  
 7 economic interests. As such, Defendants are open to scrutiny under the  
 8 Sherman Act.

9 C. SSG And STA Are Not Immune From Antitrust Liability.

10 Defendants contend that because they are a municipality regulating  
 11 taxis pursuant to a state policy, they are immune from liability. American  
 12 Cab does not dispute that taxi cabs are subject to local regulation. What  
 13 American Cab does dispute is the way in which it is regulated, the parties  
 14 actually doing the regulating, whether or not such regulation is in  
 15 conformance with the legislative intent and mandate, whether or not the  
 16 regulation is reasonable and whether or not Defendants’ regulation is in  
 17 furtherance of the legislative objectives.

18 “The state-action immunity doctrine is ‘disfavored,’ and is to be  
 19 interpreted narrowly, as ‘a broad interpretation of the doctrine may  
 20 inadvertently extend immunity to anticompetitive activity which the states  
 21 did not intend to sanction.’” *Shames v. California Travel and Tourism*  
 22 *Commission* (9<sup>th</sup> Cir. 2010) 626 F.3d 1079, 1084 (citing *Coast Mgmt.*  
 23 *Servs., Inc. v. Wash. Nat. Gas Co.* (9<sup>th</sup> Cir 1996) 99 F.3d 937, 941).

24 The “challenged restraint must be ‘one clearly articulated and  
 25 affirmatively expressed as state policy’.” *California Retail Liquor Dealers*  
 26 *Association v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, 105, 100 S.Ct.  
 27 937, 943. “It is not enough that . . . anticompetitive conduct is ‘prompted’  
 28 by state action; rather, anticompetitive activities must be compelled by

1 direction of the State acting as a sovereign.” *Id.*, at 104, 100 S.Ct. 937,  
 2 943 (quoting *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 791, 95  
 3 S.Ct. 2004, 2015).

4 “A state may unintentionally create a scheme that in some way  
 5 fosters anticompetitive conduct. But this unintended consequence—even if  
 6 foreseeable—does not satisfy the ‘clear articulation’ prong of *Midcal*  
 7 because the underlying scheme does not indicate an intention to displace  
 8 competition. *Shames, supra*, (9<sup>th</sup> Cir. 2010) 626 F.3d at 1084.

9 To prove that a policy is clearly articulated and affirmatively  
 10 expressed, the sovereign must demonstrate not only the existence of a  
 11 state policy to displace competition with regulation, but also that the  
 12 legislature contemplated the kind of actions alleged to be anticompetitive.  
 13 *Parks v. Watson* (9<sup>th</sup> Cir. 1983) 716 F.2d 646, 663.

14 The impact which local governments, acting as providers of services,  
 15 may have on other individuals and business enterprises with which they  
 16 compete may subject the government to antitrust violations. See *City of*  
 17 *Lafayette v. Louisiana Power & Light Company* (1978) 435 U.S. 389, 403,  
 18 98 S.Ct. 1123, 1132.

19 As was said in the *City of Lafayette, supra*:

20 In 1972, there were 62,437 different units of local  
 21 government in this country. Of this number 23,885 were  
 22 special districts which had a defined goal or goals for the  
 23 provision of one or several services, while the remaining  
 24 38,552 represented the number of counties, municipalities,  
 25 and townships, most of which have broad authority for  
 26 general governance subject to limitations in one way or  
 27 another imposed by the State. These units may, and do,  
 28 participate in and affect the economic life of this Nation in a  
 great number and variety of ways. When these bodies act as  
 owners and providers of services, they are fully capable of  
 aggrandizing other economic units with which they  
 interrelate, with the potential of serious distortion of the  
 rational and efficient allocation of resources, and the

1 efficiency of free markets which the regime of competition  
 2 embodied in the antitrust laws is thought to engender. If  
 3 municipalities were free to make economic choices  
 4 counseled solely by their own parochial interests and without  
 5 regard to their anticompetitive effects, a serious chink in the  
 6 armor of antitrust protection would be introduced at odds  
 with the comprehensive national policy Congress  
 established. (*Id.*, at 407-408, 98 S.Ct. 1123, 1134.)

7 “Often referred to as the ‘police power,’ this constitutional authority of  
 8 counties or cities to adopt local ordinances is ‘the power of sovereignty or  
 9 power to govern-the inherent reserved power of the state to subject  
 10 individual rights to reasonable regulation for the general welfare.’  
 11 [Citation.] The police power extends to legislative objectives in furtherance  
 12 of public peace, safety, morals, health and welfare. *Cotta v. City and*  
 13 *County of San Francisco* (2007) 157 Cal.App.4<sup>th</sup> 1550, 1557 (quoting  
 14 *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160).

15 Immunity is not afforded a municipality when “a municipality acts  
 16 beyond its delegated authority, for *Parker* purposes, whenever the nature  
 17 of its regulation is substantively or even procedurally defective. On such  
 18 an analysis it could be contended, ... if it was not, as that statute requires,  
 19 adopted ‘for the purpose of promoting health, safety, morals or the general  
 20 welfare of the community’” immunity does not apply. *City of Columbia v.*  
 21 *Omni Outdoor Advertising, Inc.* (1991) 499 U.S. 365, 371, 111 S.Ct. 1344,  
 22 1349.

23 Restriction of competition by a municipality for purposes of private  
 24 gain is not immune and subject to antitrust scrutiny. *Id.*, at 378, 111 S.Ct.  
 25 1344, 1353. “A State that allows its municipalities to do as they please  
 26 can hardly be said to have contemplated the specific anticompetitive  
 27 actions for which municipal liability is sought. Nor can those actions be  
 28 truly described as comprehended within the powers *granted*, since the

1 term, granted, necessarily implies an affirmative addressing of the subject  
2 by the State. *Community Communications Co. v. City of Boulder* (1982)  
3 455 U.S. 40, 102 S.Ct. 835, 843.

4 “While Parker recognized the States' freedom to engage in  
5 anticompetitive regulation, it did not purport to immunize from antitrust  
6 liability the private parties who urge them to engage in anticompetitive  
7 regulation.” *Id.*, at 379, 111 S.Ct. 1344, 1353.

8 Here, Defendants simply claim that because they are a municipality,  
9 they are entitled to hide under the blanket protection of immunity. In their  
10 Motion, Defendants do not provide one shred of evidence that the conduct  
11 they are undertaking entitles them to immunity. They do not provide one  
12 scintilla of evidence that the conduct they are undertaking is dictated or  
13 contemplated by the legislature. They do not produce any evidence that  
14 their conduct is for the health, safety, morals or welfare of the Coachella  
15 Valley.

16 American Cab does not dispute that the legislature provides for the  
17 regulation of the taxi cab industry. American Cab does not necessarily  
18 dispute that SSG, in a vacuum, can enact an ordinance that “chills”  
19 competition amongst the various taxi companies. However, American Cab  
20 does dispute that the Ordinance, and the method and actions used by  
21 Defendants, wearing “two hats”, to regulate the taxi cab industry to benefit  
22 STA violates the Sherman Act. American Cab contends, and has  
23 produced evidence, that Defendants have enacted regulations that prevent  
24 American Cab, and others, from fairly competing for transportation service  
25 customers.

26 Do Defendants seriously contend, in regulating the taxi cab industry,  
27 that:  
28

1           (1) Defendants' concerted action of enacting an ordinance  
2 that prevents American Cab from making arrangements for exclusive or  
3 preferential services with any business establishment or public  
4 transportation facility, while STA has no such restriction, was dictated or  
5 contemplated by the legislature, foreseeable or for the general welfare of  
6 the public?

7           (2) Defendants' concerted action of requiring surcharges to  
8 be paid by every taxi rider to fill budget shortfalls caused by inefficient  
9 regulation, thereby making STA more attractive than taxis to riders, was  
10 dictated or contemplated by the legislature, foreseeable or for the general  
11 welfare of the public?

12           (3) Defendants' concerted action of limiting the number of  
13 dispatched calls any taxi franchisee can expect by forbidding any  
14 agreement which would have the effect of increasing the number of calls  
15 for service, thereby decreasing the amount that can be reasonably  
16 charged for taxi leases and decreasing the number of taxis, was dictated  
17 or contemplated by the legislature, foreseeable for the general welfare of  
18 the public?

19           (4) Defendants' concerted action of limiting the number of  
20 taxi permits so American Cab cannot reach reasonable profitability and  
21 reduce its lease rates, so that drivers can in turn reduce meter rates for  
22 customers, to make STA more attractive, was dictated or contemplated by  
23 the legislature, foreseeable or for the general welfare of the public?

24           (5) Defendants' concerted action of dictating the total  
25 number of taxi cab permits and thereby making fewer taxi cabs available  
26 to serve the general public, causing long wait times, resulting in STA  
27 benefiting by the unavailability of taxi service, was dictated or  
28

1 contemplated by the legislature, foreseeable or for the general welfare of  
2 the public?

3 (6) Defendants' concerted action of giving the STA Chief of  
4 Staff discretion over the advertising on the exterior of the taxi cabs,  
5 controlling the taxi companies ability to add needed revenue, while STA is  
6 trying to maximize its own advertising revenue and competing for  
7 advertisers, was dictated or contemplated by the legislature, foreseeable  
8 or for the general welfare of the public?

9 (7) Defendants' concerted action to deprive the taxi cabs  
10 direct access to the public for transportation at large events in the  
11 Coachella Valley, while seeing preferred access for STA, was dictated or  
12 contemplated by the legislature, foreseeable or for the general welfare of  
13 the public?

14 (8) Defendants' concerted action to prohibit the taxi cab  
15 industry from competing with STA for provision of Dial-A-Ride services and  
16 other similar programs for the disabled, was dictated or contemplated by  
17 the legislature, foreseeable or for the general welfare of the public?

18 In reality, what Defendants have done by wearing "two hats" and  
19 enacting the Ordinance is prevent or limit the taxi cab industry's access to  
20 the general public and, as a result, provided STA with greater access to  
21 the general public, thereby increasing STA's revenue. SSG is wielding its  
22 regulatory powers for the benefit of STA, all to the detriment of American  
23 Cab. These actions were certainly not contemplated by the legislature, or  
24 reasonably foreseeable, when it provided municipalities with the ability to  
25 regulate the taxi cab industry. As such, Defendants are not immune from  
26 liability.



#### IV. CONCLUSION

As the Supreme Court stated 86 years ago in *Carter*, cited in this introduction, a person may not be entrusted in the power to regulate one's competitor. STA is in competition with the taxi franchises. The structure of STA and SSG, specifically the "two hats" their Board members and General Manager wear, causes an unavoidable conflict of interest. Unfortunately, the Board and General Manager have resolved their conflict by simply disregarding it and making every decision in a manner that favors STA and restrains free trade by the taxi franchises, and specifically American Cab. The Board members and General Manager champion STA to maximize its growth and reach, while admitting that they do not feel any similar duty to the taxi franchises. It is indisputable that Ordinance §1.225 unreasonably restrains free trade by the taxi companies to the benefit of STA.

It appears obvious that the SSG was never intended to be the taxi regulator since its joint powers agreement expressly forbids it to engage in "transit related" activities, and taxi regulation certainly is "transit related". It is transparent that since SSG was prohibited from "transit related" activities, there would be no conflict of interest in having the STA Board and General Manager also be the SSG Board and General Manager. The arguments now by American Cab seem to be exactly what was meant to be prevented by the drafters of the SSG joint powers agreement.

American Cab simply is requesting that it be regulated by a Board and manager with no conflict, agenda or bias. Specifically, American Cab is requesting that it be regulated by a regulator whose goals are both public safety and the prosperity of the taxi industry, the drivers and the owners.

1 For the foregoing reasons, American Cab respectfully submits that  
2 Defendants' have not carried their burden so their Motion must be denied  
3 in its entirety.  
4  
5

6 RUSSO & DUCKWORTH, LLP

7  
8 Dated: March 11, 2013

By: 

9 J. Scott Russo  
10 Attorneys for Plaintiff American Cab,  
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